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No. 716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MEDO CALZAVARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Medo Calzavara, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in affirming the dismissal in the District Court of petitioner's Post-Conviction Petition.

OPINION BELOW.

The Court of Appeals rendered no opinion. It affirmed the judgment of the trial court in dismissing the Post-Conviction Petition in an order dated September 23, 1966, which is unreported, but which is printed in this Petition as Appendix "A".

JURISDICTION OF THIS COURT.

1. The date of judgment sought to be reviewed was entered by the Court of Appeals for the Seventh Circuit on September 23, 1966. This Petition for a Writ of Certiorari is filed within thirty days from said denial.

2. The jurisdiction of this court is invoked under the provisions of Title 28, U.S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. May a Court of Appeals summarily dismiss an appeal from a District Court's judgment dismissing a post-conviction petition without giving any reasons therefor?

2. Where it was claimed that in the original appeal from the conviction, 345 F.2d 383, *cert. den.*, 382 U.S. 829, the Court of Appeals failed to give consideration to the actual record as made in the trial court that a defense objection was made relative to the point on appeal (separation of the jury *during* their deliberations) was not petitioner denied basic due process of law?

3. If a Post-Conviction Petition alleges facts sufficient upon which the petitioner should prevail, was it not error for the trial court to have dismissed summarily the petition without requiring the government to answer and without permitting the petitioner an opportunity to establish the factual matters alleged in his petition?

HISTORY AND STATEMENT OF THE CASE.

Petitioner and two others were convicted of a charge involving the interstate transportation of stolen merchandise, 18 U.S. Code, Sec. 2314, on October 7, 1963 and was sentenced to ten years imprisonment[1] which he is presently serving. The Court of Appeals for the Seventh Circuit affirmed, 345 F.2d 383 (1965), and this court denied certiorari, without opinion, 382 U.S. 829 (1965).

Subsequently petitioner filed his Post-Conviction Petition under 28 U.S. Code, Sec. 2255 alleging that there was a violation of the Constitution and a violation of the Federal decisions that the trial court permitted the jurors to separate overnight during their deliberations over the objections of defense counsel (App. B)[2].

The District Court did not require the government to answer, nor did it hold an evidentiary hearing. The District Court's memorandum opinion (App. C)[3] set out the reasons for the denial of the post-conviction petition to be that petitioner's lawyer did not object to the separation of the jury at the time when the judge ordered the separation during deliberations.

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[1] Petitioner's sentence was reduced by the trial court to eight years on October 27, 1965.

[2] The Post-Conviction petition is appended here as Appendix "B".

[3] The memorandum opinion of the District Court dismissing the Post-Conviction Petition is printed here as Appendix "C".

It was the claim of petitioner (Post-Conviction Petition, par. 7, App. "B") ". . . that when the facts as hereinabove set out are clearly shown and proved at a hearing, he will be entitled to the relief prayed for on the authority of the *D'Antonio* and *Panczko* cases hereinabove cited." *United States* v. *D'Antonio*, 342 F.2d 665, 7 Cir. (1965); *United States* v. *Panczko*, 353 F.2d 676, 7 Cir. (1965)).

The Court of Appeals in its memorandum order (App. "A") simply affirmed the opinion of the District Court dismissing the Post-Conviction Petition.

REASONS FOR GRANTING THE WRIT.

There is no question but that in the Seventh Circuit a jury may not properly separate during verdict deliberations if the defendant objects. *United States* v. *D'Antonio,* 7 Cir., 342 F.2d 666 (Feb. 9, 1965); *United States* v. *Panczko,* 7 Cir., 353 F.2d 676 (Nov. 29, 1965). As the Court said in *D'Antonio,* p. 669:

> "It is the right of defendant when on trial upon a charge of the commission of a felony to have his case decided by a jury whose secret *deliberations* are not interrupted by the court's order permitting them to *separate* before a verdict has been reached. Historically this is a right recognized for many years." (Emphasis, the court's.)

The issue here is whether the record demonstrates that Petitioner's objections to the separation were preserved at trial level.

The trial judge summarily dismissed the Petitioner's claim here without either requiring the government to answer or without holding a hearing in order to grant the Petitioner an opportunity to establish factual matters asserted in his Petition.

At trial, Petitioner was represented by attorney Eugene T. Daly. Another defendant, Peter DiFronzo, was represented by attorney George F. Callaghan. There were originally four defendants charged with conspiracy, each repre-

sented by his own lawyer. It was the practice of the trial judge to advise the lawyers that an objection on behalf of one defendant was considered as an objection on behalf of all the defendants unless specifically disavowed.

At a pretrial conference on September 11, 1963 (App. 7)[4] the court laid down its "ground rules." "Let's state for the record here and now that any objection made by one counsel shall stand for all defendants and other counsel need not repeat the objection, unless it is disclaimed."

To be certain there was no mistake in the "ground rules" the court indicated it would repeat the understanding in front of the jury although that was not necessary since "the question is one for ultimate review, if it is reviewed. But any objection made by one defense counsel stands for all defendants unless there is a disclaimer." (App. 7).

In addition, the Transcript of Proceedings, p. 1397, reveals that the court announced, "All right, gentlemen. I take it any motions made by one counsel stands for all counsel unless disclaimed as with respect to objections to evidence." This announcement was made at the time when the defense motions were about to be presented at the end of the government's case.

During the trial the court did consider that an objection on behalf of one defendant stood for all. When a lawyer for one of the defendants had moved for a mistrial (Tr. of Pr., p. 1224), the judge applied the motion for mistrial as to all by stating (Tr. of Pr., p. 1230), "You *gentlemen* have made motions for a mistrial on behalf of all of the defendants, which I will deny."

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[4] References to "App." are to printed Appendix of Record as filed in the Court of Appeals.

Petitioner's lawyer was made well aware of the court's rule not to repeat objections, for when Petitioner's lawyer attempted to restate an objection on one occasion, the court severely admonished him by stating, "How many times do I have to rule on it? I have ruled." (Tr. of Pr., p. 1187).

It is respectfully submitted that appellant has demonstrated here, as he could have demonstrated in the trial court, that an objection for one defendant stood for all.

Accordingly, when the court stated in its Memorandum Opinion summarily dismissing the Post-Conviction Petition, "We do not, however, reach the question of the applicability of those cases to the instant petition, for as pointed out hereafter, there was no objection by counsel for petitioner at the time when the court announced that the jury would be separated." (App. 4), the trial judge ignored its own oft repeated "ground rule."

WAS THE OBJECTION BY DEFENSE COUNSEL TO THE SEPARATION OF THE JURY SUFFICIENT?

There is no question in the record that when the judge announced he was going to permit the jury to deliberate until 10:30 P.M. " . . . at which time I would instruct them as to their duties and let them return to their homes to resume their deliberations tomorrow morning" that Mr. Callaghan, attorney for one of the defendants said, "I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning. *But I would have an objection to the jury separating.*" (App. 7-8).

The court, however, overruled the objection and stated, *"This is standard practice, Mr. Callaghan, and I am going to do it."* (App. 7-8).

When, at 11:10 P.M. the jurors stated in open court that they needed more time to deliberate (App. 7-8), the court excused them for the night and instructed them to return the next day to deliberate further. (App. 7-8).

The trial judge in summarily dismissing the Petition, expressed the view that because the objection to the separation was not *repeated* that such failure "constituted agreement with the court and withdrawal of the objection." (Judge's Memorandum Opinion, App. 6).

Petitioner respectfully submits this is an unwarranted determination by the trial judge, especially in view of his previous severe admonishment when petitioner's counsel attempted to restate an objection on one occasion. "How many times do I have to rule on it. I have ruled." (Tr. of Pr. p. 1187).

Considering the serious error in allowing jurors to separate into the city at night, where the danger of outside influences impinging upon jury deliberations is great—*United States* v. *D'Antonio, United States* v. *Panczko*—the trial judge's hypertechnical adherence to the necessity for a renewed objection after admonishing Petitioner's counsel not to repeat objections once ruled upon seems constitutionally unfair to the Petitioner.

CONCLUSION

The fact having been demonstrated that appropriate objection was made to the jury separation over night during deliberations, we pray certiorari be allowed.

Respectfully submitted,

ALBERT M. SHEPPARD,
Attorney for Petitioner.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

September 23, 1966

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

Medo Calzavara,
Petitioner-Appellant,
No. 15601 v.
United States of America,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This court having considered the record in this case transmitted by the district court to this court as well as the briefs filed by the respective parties herein, and having heard oral arguments in open court by counsel for said parties, and having taken the case under advisement for decision, the court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the dismissal of the petition from which this appeal was taken is supported by the record herein and by the law appertaining thereto.

Wherefore the order from which this appeal was taken is affirmed and the clerk of this court is directed to enter the judgment of this court accordingly.

APPENDIX "B"

POST-CONVICTION PETITION UNDER SECTION 2255, TITLE 28, UNITED STATES CODE, BY WHICH PETITIONER SEEKS A REVERSAL OF HIS CONVICTION AND A NEW TRIAL.

Your petitioner, Medo Calzavara files, this his petition to vacate the judgment of conviction and sentence heretofore imposed upon him and moves for the grant of a new trial under the authority of Section 2255, Title 18, U.S. Code, and states as follows:

1. He is presently a prisoner in custody under sentence by the United States District Court for the Northern District of Illinois, Eastern Division and is presently serving a sentence of eight years in the United States Penitentiary, in Terre Haute, Indiana. Your petitioner, was found guilty after a jury trial and sentenced to ten years in the custody of the United States Marshal. Upon application, after affirmance on review, the court reduced the sentence to eight years.

2. The judgment of conviction and the sentence thereon were imposed in violation of the Constitution and in violation of federal decisions in that court permitted the members of the jury to separate and go to their respective homes during their deliberations over the objections of defense counsel.

3. Your petitioner's claim of constitutional deprivation consists of a denial by the trial court of petitioner's motion for a new trial and a misreading and misunderstanding of

the trial record by the Court of Appeals for the Seventh Circuit. That situation came about as follows:

(a) After the jury had been deliberating on the verdict for a number of hours, Judge Will announced that he was going to allow the jurors to deliberate until 10:30 P.M. and then permit them to return to their homes and resume deliberations the following day. Defense counsel then spoke and said that, ". . . I have an objection to the jury separating." The court replied, "This is standard practice, Mr. Callaghan, and I am going to do it."

(b) Such action in permitting the jury to separate over defense counsel's objections prejudiced defendant's right to a fair trial. *United States* v. *D'Antonio*, 342 F.2d 665, 7 Cir. (1965) and *United States* v. *Panczko*, ... F. 2d ....., 7 Cir. (No. 15028, decided November 29, 1965).

4. Petitioner has heretofore prosecuted an appeal from his conviction to the Seventh Circuit Court of Appeals, 345 F.2d 383 and has raised this point in that court. However, the court's opinion, p. 385, stated:

> "On appeal all of the defendants contend the District Court erred in permitting the jury to separate after it commenced its deliberation. But the record discloses that the trial court counsel for each of the defendants agreed to the procedure outlined and followed by the trial judge in this respect. The defendants are in no position to claim error in this connection."

Such a determination by the Court of Appeals is not in consonance with the actual state of the trial record. Peti-

tioner respectfully asks the court to consider the Transcript of the trial proceedings as an Exhibit in support of this Petition. Said original Transcript of Proceedings of which this court may take judicial notice are on file with the Clerk of this Court.

5. Petitioner further avers that he filed his Petition for Certiorari in the Supreme Court, No. 287, October Term, 1964, raising the point herein set out, but that petition was denied without opinion.

6. Petitioner moves the court for a hearing in order that the record may be clearly set out as to two essential and salient facts:

(a) There was an objection to the court's announcement that the jury would separate during deliberations; and

(b) The court overruled the objection stating, "That is standard practice, Mr. Callaghan and I am going to do it."

7. Petitioner avers that when the facts as hereinabove set out are clearly shown and proved at a hearing, he will be entitled to the relief prayed for on the authority of the *D'Antonio* and *Panczko* cases, hereinabove cited.

For the foregoing reasons, your petitioner prays he be granted a hearing in connection with the matters herein alleged, and that upon such hearing the trial court vacate the judgment of conviction entered against him and order a new trial; and that the court may grant such further and other relief as the facts, law, and circumstances require.

APPENDIX "C"

Memorandum opinion of the court dismissing the petition as follows:

MEMORANDUM OPINION

This is a post conviction petition, under 28 U.S.C. §2255, brought by Medo Calzavara. On October 7, 1963, a jury of this court returned verdicts of guilty against the petitioner and two of the three other defendants named in indictment 63 CR 288. The violation charged therein involved the interstate transportation of stolen merchandise, 18 U.S.C. §2314. On November 4, 1963, petitioner was sentenced to ten years of imprisonment. The Court of Appeals affirmed the convictions, 345 F.2d 383 (7 Cir. 1965), and certiorari was denied, without opinion, 382 U.S. 829 (1965). On October 27, 1965, this court reduced petitioner's term of imprisonment to eight years. Petitioner is presently serving that sentence in the United States Penitentiary, Terre Haute, Indiana.

This petition sets forth one contention which petitioner claims requires reversal of his conviction and a new trial. The argument presented by Mr. Calzavara states that a separation of the jury during its period of deliberation, where there is an objection by counsel, is contrary to recent decisions of the Court of Appeals for the Seventh Circuit. We do not, however, reach the question of the applicability of those cases to the instant petition, for as pointed out hereafter, there was no objection by counsel for petitioner at the time when the court announced that the jury would be separated. It should also be noted that this issue was raised in the Court of Appeals by all of the defendants including the petitioner, which Court found that the record indicated agreement by all counsel to the procedure followed.

The transcript of the proceedings discloses that on October 4, 1963, at 6:00 p.m., Mr. Eugene T. Daly was present before the Court in his capacity as counsel for Mr. Calzavara. The three co-defendants and their counsel were also present. At that time the Court and all counsel were discussing the procedures to be followed by the jury during the remainder of that night and the following day. The Court stated that the jury would continue to deliberate until approximately 10:30 p.m. at which time, if verdicts were not reached, the jury would separate and return the following morning at 9:30 to resume its deliberations. In response to the Court's suggested procedure, Mr. George F. Callaghan, representing one of the other defendants, Peter DiFronzo, stated that he "would have an objection to the jury separating."

The Court then explained that separation was common, the exception being a case where there was reason to believe that the jurors would discuss the case with outsiders or tampering might be attempted. Since the jury would not be sent home until late in the evening and would resume deliberations early in the morning, the Court expressed confidence that the likelihood of any outside discussion or attempted tampering was highly remote.

Following these remarks by the Court, neither Mr. Callaghan nor any of the other defense attorneys made any objection. Moreover, at no time after the Court announced that the jury would separate, i.e., either before or after the explanation which followed the announcement, did counsel for the petitioner raise any objection to separation. Mr. Callaghan's one remark before the explanation was the only one made, and that was not made on behalf of Mr. Calzavara. Nor was any objection to the jurors separating made by any of the counsel, including Mr. Cal-

laghan, at the time later in the evening when the jurors were cautioned by the Court as to their conduct and allowed to separate. It would appear that Mr. Callaghan's silence after the Court's explanation and again later in the evening constituted agreement with the Court and withdrawal of the objection. In any event, he did not represent the petitioner when he made his objection. Since there was no objection at any time on petitioner's behalf, the Seventh Circuit cases cited by him have no bearing on this case. Petitioner, in effect, waived any objection he might have had.

Having concluded that petitioner made no objection to the separation of the jury, his petition will be dismissed.

HUBERT L. WILL
Judge

Dated: February 23, 1966

MATTERS CONTAINED IN THE PROCEEDINGS AT THE ORIGINAL TRIAL.

Extracts from Transcript of Proceedings of Pre-Trial Conference, Sept. 11, 1963 setting up the "Ground Rules" of the Trial.

The Court: Let's state for the record here and now that any objection made by one counsel shall stand for all defendants and other counsel need not repeat the objection, unless it is disclaimed.

The Court: Any objection made by one defense counsel, and I will repeat this in the presence of the jury so the jury understands it though it isn't really significant from their point of view since the question is one for ultimate review, if it is reviewed. But any objection made by one defense counsel stands for all defendants unless there is a disclaimer.

* * *

Extracts from Supplemental Transcript Filed with the Record upon Original Review.

Following the charge to the jury, a colloquy ensued between court and counsel, during the course of which the following occurred:

> "The Court: No, my instructions to the Marshal then would be to advise me, permit the jury to continue with its deliberations until I return, which would be 10:30 or thereabouts, at which time I would instruct them as to their duties and let them return to their homes to resume their deliberations tomorrow morning.

"This is the standard practice in the court at this time and I will follow it . . . ' (Supp. Tr. 3).

* * *

"Mr. Callaghan: I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, but I would have an objection to the jury separating.

"The Court: This is standard practice, Mr. Callaghan, and I am going to do it." (Supp. Tr. 7).

* * *

The jurors were brought back at 11:10 p.m. and said they needed more time to deliberate (Supp. Tr. 13-14). The court then excused them for the night instructing them to return the following morning to deliberate further. (Supp. Tr. 16-17).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 716

MEDO CALZAVARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and two co-defendants were convicted by a jury, in the United States District Court for the Northern District of Illinois, of transporting stolen goods in interstate commerce and of conspiracy, in violation of 18 U.S.C. 2314 and 371. Petitioner was sentenced to imprisonment for ten years on the substantive count and five years on the conspiracy count, the terms to run concurrently. The sentence was re-

duced to eight years on October 27, 1965 (Pet. App. C, p. 5).

On appeal, all of the defendants belatedly urged (by supplemental brief) that the trial court had committed reversible error in permitting the jury to separate overnight during its deliberations, relying on the then recently decided case of *United States* v. *D'Antonio*, 342 F. 2d 667 (C.A. 7). The court of appeals rejected this contention on the ground that the record established that counsel for each defendant at trial, including petitioner's counsel, had agreed to the jury-separation procedure outlined and followed by the trial court. *United States* v. *DiFronzo*, 345 F. 2d 383, 385 (C.A. 7). Petitioner and co-defendant DiFronzo filed petitions for certiorari, contending, *inter alia*, that the court erred in permitting the jury to go home overnight during its deliberations. This Court denied the writ. 382 U.S. 829.

On November 29, 1965, the Seventh Circuit, in *United States* v. *Panczko*, 353 F. 2d 676, held, in effect, that separation of the jury over defense objection was, without more, reversible error. Thereafter, petitioner filed the present motion to vacate his sentence under 28 U.S.C. 2255, complaining that there had been a separation of the jury over counsel's objection (Pet. App. B, pp. 2-4). The district court denied the motion without a hearing, stating that the record showed that there was no objection by counsel for petitioner and that the objection made by DiFronzo's counsel was impliedly withdrawn during

subsequent discussions (Pet. App. C, pp. 5-7). The court of appeals affirmed (Pet. App. A).

The question presented in this case—*i.e.*, "whether the record demonstrates that Petitioner's objections to the separation [of the jury] were preserved at the trial level" (Pet. 5)—was raised and decided adversely to petitioner on direct review. There is no reason why it should be reconsidered on collateral attack. See *Frye* v. *United States*, 337 F. 2d 385, 386 (C.A. 7); *Davis* v. *United States*, 311 F. 2d 495 (C.A. 7), certiorari denied, 374 U.S. 846; *Franano* v. *United States*, 303 F. 2d 470, 472 (C.A. 8), certiorari denied, 371 U.S. 865.

As we pointed out in our brief in opposition to petitioner's earlier petition for certiorari (Nos. 286 and 287, October Term, 1965, pp. 4-9), it was DiFronzo's counsel, not petitioner's, who had initially objected to separation of the jury. Nothing in the record suggests that one counsel's objection, in an informal conference with the court outside the presence of the jury, would be treated as an objection by all counsel. Moreover, discussions with the trial court at an evening session on the day of the initial objection by DiFronzo's counsel indicated (as both courts below found) that all counsel ultimately agreed to the jury-separation procedure. Thus, when the judge, after outlining the procedure he planned to follow, expressly asked whether there were any objections, DiFronzo's counsel raised only one minor objection; neither he nor anyone else objected to the

jury's separating (B.A. 9a-10a).[1] The district court properly construed this conduct as "agreement with the Court and withdrawal of the objection" (Pet. App. C, p. 7). Indeed, at least as to petitioner, the record reflects express consent to the separation procedure.[2]

There is no substance to petitioner's suggestion that the court of appeals did not consider the record on direct appeal when it held that counsel for all defendants agreed to the procedure used (Pet. 2). Briefs for both sides (see n. 1, *supra*) pointed out all relevant parts of the record for the court to consider, including the initial objection by DiFronzo's counsel. The court obviously accepted the government's argu-

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[1] "B.A." refers to the Addendum to the government's brief in the court of appeals, which we are lodging with the Clerk of this Court. In this brief are reprinted the portion of petitioner's supplemental brief on direct appeal in which the jury-separation issue was first raised (pp. 5-6), and the government's supplemental brief and appendix filed on direct appeal in response to the jury-separation contention (pp. 1a-15a).

[2] Mr. Callaghan, who represented DiFronzo at the trial and represented petitioner on direct appeal, spoke on behalf of petitioner at the evening session, after the court had outlined, and counsel had agreed to, the jury-separation procedure (B.A. 11a):

> Mr. Callaghan: I might suggest to the Court so the record is clear that Mr. Daly is not here [tonight] representing Mr. Calzavara. He had to go home. I speak for Mr. Calzavara in Mr. Daly's absence. For Mr. Calzavara, Mr. Calzavara consents to that proceeding.
>
> The Court: Is that correct, Mr. Calzavara?
>
> The Defendant Calzavara: Yes, sir.
>
> The Court: All right, Mr. Marshal, bring in the jury, please.

ment that agreement to the procedure used could reasonably be inferred from the subsequent discussion between the court and counsel. The district court reached the same conclusion on this motion under 28 U.S.C. 2255.

Nor is there merit in the contentions (Pet. 2) that the district court should have held a hearing on the Section 2255 motion or required the government to respond and that the court of appeals dismissed the appeal without assigning reasons therefor. The issue raised in the district court was susceptible of resolution on the basis of the trial record alone. And the court of appeals' statement that the denial of the motion was supported by the record and the law constituted a sufficient statement of the reasons for affirmance, if one was required—particularly where the district court had specified in some detail its reasons for denying the motion.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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